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October 21, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Ex Parte Filing
CC Docket No. 96-115 ✓

Dear Ms. Salas:

The Association of Directory Publishers ("ADP") responds to the September 22, 1998 ex parte filing of the Yellow Pages Publishers Association ("YPPA"). In addition, ADP brings to the Commission's attention a recent decision of the New York Public Service Commission holding that subscriber list information ("SLI" or "listings") should be provided to directory publishers at local exchange carriers' ("LECs") incremental costs.

I. VIOLATIONS OF SECTION 222(e) ARE WELL-DOCUMENTED.

YPPA states that "[i]n the more than 30 months that since [sic] the adoption of Section 222(e), YPPA is not aware of a single formal complaint filed at the Commission." At best, this statement is irrelevant, and at worst, misleading. ADP continues to receive, on a regular basis, requests from its members for assistance in dealing with LECs who offer listings at discriminatory or unreasonable rates or refuse to provide listings altogether. These instances are well documented in ADP's more than 40 ex parte submissions.

Based on assurances by the Commission that rules implementing Section 222(e) were forthcoming, ADP has encouraged its members to refrain from filing formal complaints until the Commission has had a chance to promulgate rules. That said, the Enforcement Division of the Common Carrier Bureau has received several informal complaints from ADP members. Other members have filed complaints at the state public utility commissions and are actively participating in state proceedings concerning SLI.

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Magalie Roman Salas, Secretary
October 21, 1998
Page 2

At least one publisher has filed a lawsuit resulting in a primary jurisdiction referral to the Commission concerning the reasonableness of LECs' rates for SLI under Section 222(e).¹

II. SECTION 222(e) REQUIRES ILECs TO PROVIDE INDEPENDENT DIRECTORY PUBLISHERS WITH SLI OBTAINED FROM CLECs.

YPPA erroneously asserts that the method by which an incumbent local exchange carrier ("ILEC") obtains competitive local exchange carrier ("CLEC") listings is "irrelevant" to whether ILECs should be required to provide independent directory publishers with SLI obtained from CLECs. To the contrary, this information is extremely relevant. ILECs commonly obtain CLECs' listings as a condition of entering into interconnection agreements with the CLEC. When an ILEC gathers SLI pursuant to such an agreement, it does so in its capacity as a provider of telecommunications service. Thus, ILECs that collect SLI from CLECs as a by-product of interconnecting with the CLEC must provide the CLEC listings to independent directory publishers under the same terms and conditions as they provide the listings to their own directory affiliates.

III. YPPA'S EMPHASIS ON THE LOUISIANA PSC STAFF RECOMMENDATION MERELY UNDERScores THE NEED FOR A NATIONAL FRAMEWORK.

YPPA brings to the Commission's attention a Louisiana Public Service Commission ("Louisiana PSC") Staff Recommendation that LECs receive "fair compensation" for the "value of [their SLI], including the cost of gathering and maintaining the data, while still ensuring that independent directory publishers have access to the information." As an initial matter, ADP wishes to point out that the Louisiana PSC has not yet acted on this recommendation. As such, it is of limited value.

It also is somewhat ironic that YPPA has embraced the Louisiana PSC staff's conclusions because the staff correctly determined that cost is the relevant benchmark in establishing a reasonable price for SLI. However, in

¹ See ADP Ex Parte Filing in CC Docket No. 96-115, filed Jan. 20, 1998.

Magalie Roman Salas, Secretary
October 21, 1998
Page 3

rejecting the notion that reasonable rates mean incremental costs, the Louisiana PSC staff failed to appreciate the policy that underlies Section 222(e). Congress passed Section 222(e) to promote competition in the directory publishing market and to prevent LECs from behaving anticompetitively toward their directory publishing competitors. It seems clear that these goals can only sensibly be achieved by ensuring that independent directory publishers pay for listings at a price approaching the incremental cost of providing them. Under any other cost allocation scheme, LECs would be able to extract monopoly profits under the guise of "market" pricing due to the fact the LECs represent the sole source of SLI.²

Moreover, the Louisiana PSC Staff decision merely underscores the need for a uniform national policy concerning the provision of SLI. As discussed below, in Section IV, unlike the Louisiana PSC, the New York Public Service Commission ("New York PSC") has correctly understood the policy behind Section 222(e) and concluded that a reasonable rate must be based on incremental cost in order to properly carry out Congressional intent. It is clear that a patchwork of state regulations governing SLI would impair the ability of independent directory publishers to operate nationally because multiple state regulations would impose significant economic burdens on publishers. The Commission has ultimate oversight authority for Section 222(e) and must set guidelines to ensure that inconsistent state regulations are avoided.

² The U.S. Copyright Office definitively has concluded that SLI is a "prototypical example" of "sole source" data. U.S. Copyright Office, Report on Legal Protection for Databases (August 1997). ADP has filed copies of this report with the Commission. See ADP Ex Parte Filing in CC Docket No. 96-115, filed Sept. 18, 1998.

Magalie Roman Salas, Secretary
October 21, 1998
Page 4

IV. NEW YORK PSC DECISION.

On July 22, 1998, the New York PSC released an order concerning SLI issues.³ The New York PSC found that "the completeness and timeliness of the [SLI] data, as well as the frequency of updates being provided, should be equivalent to that which the incumbent provides to its own publisher."⁴ In addition, the New York PSC indicated that "listings prices should resemble their underlying incremental costs."⁵ The New York PSC has come to the proper conclusions regarding Section 222(e). The Commission must ensure, through the implementation of national guidelines, that these conclusions are not undermined by inconsistent regulations in other states.

³ Proceeding on Motion of the Commission to Examine Issues Related to Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Order Regarding Directory Database Issues (New York PSC July 22, 1998), attached hereto as Exhibit A ("New York PSC Order"). Bell Atlantic and the New York State Telecommunications Association have filed petitions for rehearing of this order.

⁴ Id. at 4.

⁵ Id. at 5.

Magalie Roman Salas, Secretary
October 21, 1998
Page 5

Pursuant to the Commission's rules, two (2) copies of this letter are being filed. Please call Michael Finn at (202) 429-4768 or Sophie Keefer at (202) 429-4730 if you have any questions regarding this filing.

Sincerely,

A handwritten signature in cursive script that reads "Sophie J. Keefer". The signature is written in dark ink and is positioned above the typed name and title.

Michael F. Finn
Sophie J. Keefer*
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